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In the

Supreme Court of the United States

October Term, 1977

No. 77-1734

THE WARDEN OF THE WEST VIRGINIA PENITENTIARY,

Petitioner,

v.

ROGER JONES,

Respondent.

[redacted]

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[redacted]

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[redacted]

June 15, 1978

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BRIEF ON BEHALF OF RESPONDENT, ROGER JONES

Respondent accepts the preliminary statement, the statement on jurisdiction, and the statement on the question presented in Petitioner's petition.

I. STATEMENT OF THE CASE

Respondent accepts the statement of the case contained on pages 2 and 3 of Petitioner's brief except that portion dealing with the question of whether Respondent objected to the condemned instruction given during his trial. In the West Virgnia Supreme Court of Appeals, Respondent asserted two (2) positions regarding the erroneous instruction which was condemned by this Court in *Mullaney* v. *Wilbur*, 421 U.S. 684, 95 S. Ct. 1881, 44 L.Ed.2d 508 (1975) and by the

West Virginia Supreme Court of Appeals in *State* v. *Pendry*, 227 S.E.2d 210 (W.Va. 1976). First, Respondent asserted that it was not necessary to make an objection to the instruction in view of the constitutional requirements enunciated in the *Mullaney* decision, *supra*, and in *Pendry*, *supra*. Secondly, Respondent argued that the record revealed appropriate objection had been made to the instruction and that a counter-instruction on the very issue had been tendered by Respondent's counsel in the trial court. Petitioner quotes the objection made to the specific instruction on page B-7 of his brief. However, Petitioner fails to set forth in his petition or brief other pertinent facts reflected in the transcript of the trial pertaining to the position Respondent took. At the trial court level Respondent tendered Instruction No. 25 which read as follows:

> "NO. 25—The Court instructs the jury that there is no presumption of malice from the mere fact of killng, but the burden is upon the State to prove beyond a reasonable doubt that the killing was done with malice, expressed or implied." (Transcript 238).

This instruction raised the very issue involved as shown by the dialogue between the prosecuting attorney and the court at the time the instruction was considered. That dialogue was as follows:

> "BY THE COURT:
>
> * * * Now as to defendant's instruction 25, I'd like to hear what the Prosecution's got to say about that? (Transcript 206)
>
> BY MR. WATSON:
>
> Yes, Your Honor. When we were going over that instruction, we noted we didn't have an

> instruction covering that point but we think this does not state the law. It's not complete, either, because we feel that the law in this state is that there is a presumption of malice from the fact of a killing with a deadly weapon, and this instruction says that that can not be presumed. (Transcript 207)
>
> BY THE COURT:
>
> I think that's correct, so I'll refuse that." (Transcript 207)

In deciding the issue the West Virginia Supreme Court merely based its decision upon the first argument in the present case advanced by the Respondent as is revealed by the quoted language on page 3 of Petitioner's brief. That court did not rule upon the second argument advanced by Respondent as it was not necessary to do so for the purpose of deciding the issue.

II. ARGUMENT

The statement of the issue presented for decision in the petition filed by Petitioner differs materially from the question presented for review in the brief. In the petition the issue is whether or not the retroactivity rule enacted in *Hankerson* v. *North Carolina*, ... U.S. ....., 97 S. Ct. 2339, 53 L.Ed.2d 306 (1977), was to be applied to collateral proceedings such as the habeas corpus proceeding initiated by this Respondent. In the brief, however, Petitioner modified the issue and merely poses the question of whether or not the *Hankerson* decision required complete retroactivity even to cases not pending on direct appeal. In his argument, Petitioner then proceeds to concede on page B-6 of his brief that the *Hankerson* decision requires complete retroactivity, but argues that no adequate objection had

been made to the condemned instruction in light of Rule VI(c) of the West Virginia Trial Court Rules. (Petitioner's Brief, pages B7-B10). The entire thrust of the argument for reversal of the lower court deals with the issue regarding the adequacy of the objection. Yet, the record shows that an instruction specifically dealing with the issue of presumption was tendered by Respondent's counsel, discussed by the prosecutor as to its effect of shifting of the burden of proof and rejected by the trial court on that basis. To assert, as Petitioner does, that the trial court was not made aware of the Respondent's position in light of Instruction No. 25 tendered by Respondent (Defendant) ignores the record. In light of the facts revealed by the record, Respondent submits that there is no factual basis upon which Petitioner can rely for reversing the decision of the Supreme Court of West Virginia upon the asserted failure to object to the instruction.

Petitioner also asserts in support of his position at page B-11 of his brief that prior to *Mullaney* and *Pendry* that it had been thought that the instruction in question was a valid instruction. This argument, Respondent submits, is not based upon logic nor practice. Trial courts in many states, including West Virginia, prior to *Mullaney* and *Pendry*, *supra*, had given similar types of instructions which, it is safe to say, the trial judges thought at the time were correct. At the same time, however, it must be recognized that at least some attorneys representing accused persons were objecting to these instructions on the basis that they were not correct and were attempting to get the trial courts to recognize mandated constitutional requirements, but were overruled. Therefore, it is impossible to gain support for an argument by merely stating that someone

thought that an instruction was correct when on the other hand it is equally clear from reviewing the records in these cases that other lawyers thought they were wrong.

The issue raised by this petition was fully and adequately considered by the Supreme Court of Appeals of West Virginia in the case of *State* v. *Pendry*, *supra*, and in the present decision involving Respondent. This Court likewise decided the very issue in *Hankerson*, *supra*. While *Hankerson* left open the question on objections being interposed to the condemned instruction, a review of the record in this case clearly shows that Respondent brought this issue to the attention of the trial court at the time of his trial. Consequently, there is no basis in fact in the record to bring this case within what might be recognized as an exception in *Hankerson*.

For the foregoing reasons, Respondent submits that the petition for writ of certiorari should be denied and that the opinion of the Supreme Court of Appeals of the State of West Virginia should thereby be affirmed.

Respectfully submitted,

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June 15, 1978

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of June, 1978, three copies of the Brief on Behalf of Respondent, Roger Jones, were mailed, postage prepaid, to Chauncey H. Browning, Jr., Attorney General, and Richard E. Hardison, Deputy Attorney General, State Capitol, Room 26-E, Charleston, West Virginia 25305, counsel for Petitioner. I further certify that all parties required to be served have been served.

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